United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To Be Argued By
GARY P. NAFTALIS

76-1143

B
P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76 - 1143

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

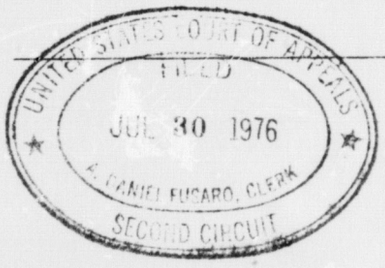
- against -

CHARLES D. ERB and
FRANKLIN S. DeBOER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT FRANKLIN S. DeBOER



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UNITED STATES OF AMERICA,

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On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF ON BEHALF OF FRANKLIN S. DeBOER

This reply brief is respectfully submitted in response to Points I, II and V of the Government's brief.

POINT I

THE EVIDENCE OF DeBOER'S GUILT WAS INSUFFICIENT

The issue raised by this case is whether someone can be held criminally responsible for the filing of a false registration statement when he had nothing to do with its preparation or filing, had no responsibility for its contents and no knowledge either of its contents or that it was being

filed. There is no legal precedent for such a rule of criminal responsibility.

In its memorandum, the Government is unable to point to a single piece of evidence which connects DeBoer to that false document. Instead, the Government points to the meeting on April 22, 1969 (discussed in our main brief of this appeal) in which there is no discussion about the specific false registration statement which is the subject of Count 2 of the indictment. At best this conversation might suffice to establish a conspiracy amongst DeBoer and Van Aken to conceal. (The conspiracy count was dismissed by the trial court however.) It does not suffice to connect DeBoer to the specific false registration statement in issue.* See United States v. Dickerson, 508 F.2d 1216, 1217-18 (2d Cir. 1975). The Government has cited no case where someone who is not responsible for a document can be held criminally responsible absent connection to that document.

United States v. Wolfson, 437 F.2d 862 (2d Cir. 1970), provides no assistance to the Government. In that case, Wolfson, who was chairman of the board and controlling stockholder of Merrit-Chapman & Scott ("Merrit") and Gerbert, who was vice president, a director and a substantial stock-

* The Government misstates the record by implying that DeBoer appointed Van Aken as his agent regarding this registration statement. There was no such evidence.

holder, were held responsible for the 10-K statement filed by Merrit. Both knew that the 10-K statement was being filed and that a large commitment of the company's was not being disclosed therein. Indeed, on remand, the jury was instructed that they had to find that Wolfson and Gerbert knew that the 10-K was being filed (see charge of Judge Wyatt, dated September, 1973 at p. 2143).

On the appeal, the Court of Appeals simply held that under these circumstances the mere fact that Wolfson and Gerbert had delegated the responsibility for filing the document to a minor company official would not relieve them of responsibility.

Such is not the case here. Unlike Wolfson, DeBoer was not the chief executive or a significant officer of Xprint, the issuer, that filed the registration statement. He was merely a 1% partner, and managing partner in name only, of the underwriter. Hence he did not delegate the responsibility for filing the registration statement to DeCoster -- for he had no power or responsibility to do so. Unlike Wolfson, there was no evidence that DeBoer even knew that the registration statement was being filed on August 20, 1969, and what it omitted.

United States v. Markee, 425 F.2d 1043 (9th Cir.), cert. denied, 400 U.S. 847 (1970), also cited by the Government,

involved false filings with the FHA based on information supplied by defendant, whose commissions were increased substantially as a result of the falsity. The evidence in Markee was clear that defendant "actively participated in the falsification of the corporate records", which then had to be reflected in the filings. The Court recognized, however, that to be guilty of causing a proscribed act, a defendant must not only participate in the false filing, he must "have the specific intent of 'bringing about' the forbidden act" (i.e., the filing itself). 425 F.2d at 1046. In the instant case, there was no proof that DeBoer participated in preparing or reviewing the filing. Neither was there proof that he intended at the April 22, 1969 meeting to cause a false registration statement to be filed.

In United States v. Escow, 422 F.2d 1060 (2d Cir. 1970), mail fraud charges were brought against the president (Escow) of the issuer of those false statements and against the administrative vice president in charge of the issuer's accounting department. As to Escow, the evidence was that his family owned 80% of the stock of the issuer, that he knew of the falsity of the figures in the statements before they were mailed, and that he nevertheless authorized the use of those figures. As for the administrative vice president

"he was the principal architect of the manipulations . . ." (422 F.2d at 1068). He was the one who actually falsified the figures with knowledge that the figures would be mailed to lenders.

DeBoer, to the contrary, had no contact at all with the issuer. He was merely a 1% partner of the underwriter and as such had no participation in the drafting of the registration statement or knowledge of its contents. Indeed, there was no proof that he even knew a registration statement which would contain inaccurate information would eventually be filed.

The other cases cited by the Government are inapposite. United States v. Leggett, 269 F.2d 35 (7th Cir. 1959) involved the interstate transportation of a stolen automobile, which transportation the defendant arranged and supervised. United States v. Scandifia, 390 F.2d 244 (2d Cir. 1968), involved the interstate transportation of counterfeit bonds, which defendant knew were counterfeit and the transportation of which defendant himself arranged. United States v. Berger, 325 F.Supp. 1297 (S.D.N.Y. 1971), aff'd 456 F.2d 1349 (2d Cir.), cert. denied, 409 U.S. 892 (1972), involved the filing of false tax returns by a corporation of which defendant was chief executive officer. The evidence showed

that defendant directed the making of the particular false entries which he knew would be reflected in the tax return. Unlike Berger, DeBoer did not direct or participate in the drafting of the false document. Nor did he know (as did Berger) that any false information would be included in a filing.

The Government's attempt to distinguish United States v. Koenig, 388 F.Supp. 670 (S.D.N.Y. 1974) is unavailing. Koenig, like Wolfson, stands for the proposition that one can be criminally liable for a false filing, only if he was involved in its preparation or filing or had a duty to insure the accuracy of its contents. Krantz was not found to be a participant even though, contrary to the Government's statement, he was a member of the board when some of the filings were made. Similarly, another director, Mulligan, whom the Government completely ignores in its brief, was held to have a duty as to only one of the filings (but not the others) because he chaired the committee of the board charged with reviewing its contents. DeBoer, quite dissimilarly, neither participated in the drafting or the filing of the S-1, nor had any role in reviewing it.

The Government cannot rely on a theory that DeBoer as the nominal managing partner of an underwriter, and the

owner of 1% thereof, is responsible under the criminal laws for misstatements in a registration statement in the absence of evidence that he participated in drafting or reviewing the filing (Gov't Brief, p. 11-12). Indeed, it is doubtful whether a civil case would even lie against DeBoer. In Ernst & Ernst v. Hochfelder, 96 S.Ct. 1375 (1976), the Supreme Court recently held that an accountant has no duty under the securities laws to assure that statements in filings are accurate in the absence of evidence that the accountant had knowledge of the falsity. Shortly after deciding Hochfelder, the Supreme Court remanded Sanders v. John Nuveen & Co., 96 S.Ct. 1659 (1976) rev'g, 524 F.2d 1064 (7th Cir. 1975), to be redetermined under the standards set forth in Hochfelder. Sanders involved the very issue in question here, i.e., can an underwriter be liable under the federal securities laws for misstatements in a registration statement when the underwriter did not know of the falsity? The remand can only mean that the underwriter has no such duty. Certainly the same must be true of DeBoer, the nominal managing partner of the underwriter. Under these cases, DeBoer had no duty to assure that the registration statement was accurate. Because he neither participated in the drafting of it, nor reviewed it, nor had a duty to do so, his conviction cannot stand.

Perhaps realizing that the April 22, 1969, meeting

is insufficient as a matter of law to convict DeBoer of the August 20, 1969 filing, the Government now argues that DeBoer is guilty because in May 1969 he wrote a note to Van Aken asking Van Aken to obtain the stock for DeBoer. From this single fact, the Government says DeBoer appointed Van Aken his agent to prepare and file a registration statement, make false entries therein and obtain stock pursuant thereto. This simply does not follow.*

The Government also argues that the filing of three letters with the SEC months after the registration statement was filed "clearly demonstrat[ed] [DeBoer's] knowledge that a registration statement had been filed and that it falsely listed James Lovelett as a selling shareholder" (Gov't brief, p. 11). The Government omits to state that those three letters formed the basis of three separate counts in the indictment of which the jury acquitted DeBoer. The jury's action means that they did not believe that DeBoer had anything to do with those letters. In any event, the letters were filed months after the registration statement and do not constitute proof of knowledge of anything about the registration statement.

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*The Government's argument also points out the problem with the trial judge's charge that a jury may presume that a person intends the "natural and probable or ordinary consequences of his acts." This charge permitted the jury to make the series of conclusions noted above. In effect, it placed on defendant the burden of submitting proof that he did not intend a false registration statement to be filed when he asked Van Aken for his stock in May 1969. See infra at pages 14-15.

POINT II

THE STATUTE OF LIMITATIONS BARS DeBOER'S CONVICTION

In our brief we pointed out that DeBoer's alleged acts of aiding and abetting occurred outside the statute of limitations thereby precluding prosecution of DeBoer. In response, the Government argues that the statute of limitations only runs from the time the crime is complete. The Government thus claims that the statute of limitations does not begin running until August 20, 1969, when the principal, the lawyer DeCoster, filed the false registration statement with the SEC in Washington, D.C. The Government claims that DeBoer as an aider and abettor could not be prosecuted unless the principal [DeCoster] committed a crime, and no crime was committed until the registration statement was filed in Washington, D.C. on August 20, 1969. Since the indictment was filed August 19, 1974 (4 years and 364 days later), the Government argues that the statute of limitations does not bar DeBoer's prosecution. We respectfully disagree. The real issue is when Mr. DeBoer's crime is complete, not when someone else's crime is. DeBoer's crime is complete after he commits his last act of aiding and abetting, which is concededly outside the statute of limitations period. Indeed, as noted in our main brief, we are unaware of any reported case where an aider and abettor, whose acts of aiding and abetting were outside the statute of limitations period,

has been held criminally responsible if the principal's acts were within the limitations period.*

Certainly, United States v. Campbell, 426 F.2d 547, 553 (2d Cir. 1970) cited by the Government does not stand for that proposition. Campbell dealt with the question of whether a five-year or a six-year statute of limitations was applicable to the crime of aiding and abetting the unlawful receipt of a fee for the performance of official duties. It did not deal with whether a statute of limitations barred prosecution when the only act of aiding and abetting occurred in a period barred by the statute.

If the limitations statute permitted such a prosecution, an almost indefinite statute of limitations would be created for aiders and abettors while that set forth for the principal would be fixed. Thus, if the Government is correct, the statute of limitations for an aider and abettor such as DeBoer would totally depend upon the fortuitous circumstance of when the principal physically filed the registraiton statement. Hence, under the Government's theory, DeBoer could be charged with any and all filings occurring after August 19, 1969, based upon acts of aiding and abetting which occurred only in April and May, 1969 -- while the principal would have a fixed five-year statute of limitations beginning with the date he acted. Such an anomalous result extending the

*The failure to find such authority supporting the Government's attempt to extend the limitations period may well indicate that stale claims such as this are not properly the subject of criminal prosecution.

limitations period for aiders and abettors would run counter to the well-settled rule that statutes of limitations are to be liberally interpreted in favor of the accused. See, e.g., Toussie v. United States, 397 U.S. 112, 115 (1970); United States v. Marion, 404 U.S. 307, 322 n. 14 (1971).*

POINT III

THE TRIAL COURT ERRED IN THREE MATERIAL RESPECTS IN ITS INSTRUCTIONS TO THE JURY

A. The Trial Court Erred In Its Instructions To The Jury On Aiding and Abetting

The only evidence of DeBoer's involvement in filing a false registration statement was a meeting he attended four months prior to the filing in which he mentioned that a nominee might be used to avoid NASD or SEC rules concerned with underwriters' compensation. There was no discussion at that meeting about the need to file a registration statement and there was no proof that subsequent to the meeting DeBoer had anything to do with the registration statement.

Assuming that these facts were sufficient to convict DeBoer, (See Point I supra), the closeness of the case

*The Government in a footnote at page 14 of its brief analogizes to conspiracy law. Besides the fact that the conspiracy count was dismissed at the end of the Government's case, here the principal (DeCoster) who prepared and filed the registration statement was not a co-conspirator. The analogy thus fails. DeBoer is not responsible for DeCoster's actions and the statute of limitations is not affected thereby.

required that the judge instruct the jury that a defendant must be a participant in the crime and not merely a knowing spectator. His failure to do so constitutes reversible error. The cases cited by the Government do not require a different result.

The defendant in United States v. Finkelstein, 526 F.2d 517 (2d Cir. 1975), was convicted of a market manipulation. The evidence was clear that he had participated in the manipulation itself by attending a meeting at which securities were sold and that he had knowledge of the manipulation then taking place. This is unlike the case at bar, where there is no evidence that DeBoer had anything to do with the criminal act, i.e., the filing of the false registration statement. In other cases cited by the Government, McDonnell v. United States, 472 F.2d 1153 (8th Cir. 1973) and United States v. Milby, 400 F.2d 702 (6th Cir. 1975), as in Finkelstein, there was ample proof that the defendants had participated in the crime in McDonnell, breaking and entering a bank and in Milby, assault. In the instant case, there was no such proof of DeBoer's role in preparing or reviewing the false registration statement. In short, the closeness of the case required an instruction that participation must be shown and that mere knowledge was insufficient. The failure to give that charge requires reversal.

B. The Trial Court Erred In Its Charge Concerning Donald Sedgwick

The Government contends that the trial Court's charge on the failure to call Donald Sedgwick as a witness was not error. It argues that Sedgwick's denial of being a nominee was immaterial with respect to DeBoer because DeBoer's counsel had adequately attacked Van Aken's credibility by pointing out his prior convictions, his deal with the Government and his being an unindicted accomplice. Sedgwick's testimony, however, would not have merely been additional impeachment of a collateral nature. That testimoney would have put the lie to one of the most important facts in the case -- were nominees used by the defendants and Van Aken?

The Government misstates the holding of the most relevant case it cites. In United States v. Dixon, Dkt. No. 75-1317, slip op. 2615, 2623-24 (2d Cir. March 12, 1976), the issue was whether the defendant had been properly informed about certain facts. The Court said:

> "Although the accountants from [Ernst & Ernst] were questioned by both sides prior to trial--and defense counsel claimed that their testimony would establish that Dixon had been misinformed--neither the Government nor the defendant called them as witnesses. The judge properly instructed that an adverse inference could be drawn against either side from failing to do so, United States v. Beekman, 155 F.2d 580, 584 (2 Cir. 1946); United States v. Llamas, 280 F.2d 392 (2 Cir. 1960);. . ."*

*The Government in its brief at 28 says:

> "In that case [United States v. Dixon] a charge

(cont'd on page 14)

The other cases cited by the Government do not deal with the question of whether the trial judge erred in labelling Sedgwick as a cumulative witness. Neither United States v. Rosner, 516 F.2d 269 (2d Cir. 1975) nor United States v. Pacelli, 521 F.2d 135 (9th Cir. 1975) deal with the proper charge to be given when an important witness is not called. As for the Government's attempt to distinguish defense counsel in the instant case did comment on Sedgwick's absence in summation. (See Government brief at p. 27).

C. The Trial Court Erred In Charging That The Jury Should Presume That A Person Intends The "Natural and Probable or Ordinary Consequences Of His Acts."

The Government argues that where only a general intent to commit some crime is required, rather than a specific intent, the natural and probable consequence charge is proper. However, to be found guilty as an aider and abettor, the Government must prove such specific intent, i.e., that defendant consciously assisted the commission of a specific crime in a specific way. United States v. Dickerson, supra, 508 F.2d at 1217-18.

The instant case shows why the charge is improper.

*(cont'd from p. 13)

> cautioning against adverse inference by either side was approved, even though defense counsel claimed that a certain witness would in fact provide exculpatory material."

This is clearly incorrect.

From the April 22, 1969, meeting where nominees were discussed a jury might presume as a "natural or probable" consequence that DeBoer intended a registration statement to be filed which would contain false statements about such nominees, even though there was no mention of a registration statement, or the falsifying of a registration statement, at the meeting. From the May 1969 note in which DeBoer simply asked Van Aken to get his stock, a jury might presume that DeBoer thereby instructed Van Aken to prepare and file a registration statement with a false statement in it even though there was no such instruction contained in the note. Such presumptions place an unconstitutional burden on defendant to refute them. As this Court has recognized, the use of that charge requires reversal. United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975); United States v. Barash, 365 F.2d 395 (2d Cir. 1966).

The charge itself was "plain error" under Rule 30, Fed. Rules Crim. Proc. and the cases cited above, thus obviating counsel's failure to object. See Screws v. United States, 325 U.S. 91, 107 (1945), where an improper charge in the issue of intent was held to be plain error. See also, United States v. Krosky, 418 F.2d 65 (6th Cir. 1969).

Moreover, the cumulative effect of the three errors constitutes such plain error as to make an objection unnecessary.

CONCLUSION

The conviction of appellant Franklin S. DeBoer should be reversed.

DATED: New York, New York
July 28, 1976

Respectfully submitted,

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